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ALEXANDER L. STEVAS,
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Case No. _____

IN THE

Supreme Court of the United States

October Term, 1983

EDWARD SACK

Petitioner.

v.

KIMBERLY-CLARK CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Did the lower courts in this case incorrectly interpret the Age Discrimination in Employment Act and the applicable case law so as to prevent any claimant from establishing a prima facie case if the employer alleges dissatisfaction with the employee's job performance?

II. Did the lower courts in this case improperly consider the employer's statements regarding its own subjective motivation when determining whether the claimant established a prima facie case?

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Other Source

Smith & Legette, Recent Issues in Litigation Under the Age Discrimination in Employment Act, 41 Ohio St. L.J. 349 (1980) 18

REFERENCE TO OPINION BELOW

The per curiam order of the United States Court of Appeals for the Seventh Circuit, dated July 28, 1983, is an unpublished opinion which is reproduced as Appendix A. The decision and order of the United States District Court for the Eastern District of Wisconsin, dated November 23, 1982, is reproduced as Appendix B.

JURISDICTION

The Order of the Court of Appeals for the Seventh Circuit affirming the judgment of the District Court for the Eastern District of Wisconsin was entered July 28, 1983. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

The case involves primarily the following sections of Chapter 14 of Title 29 of the United States Code:

§ 621. Congressional statement of findings and purpose.

(a) The Congress hereby finds and declares that -

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave.

(4) the existence in industries

affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 623. Prohibition of age discrimination

Employer Practices

(a) It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunitites or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

. . . .

Lawful practices: age as occupational qualification; other reasonable factors; seniority system; employee benefit plans; discharge or discipline for good cause.

(f) It shall not be unlawful for an employer, employment agency, or labor organization

(1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) to discharge or otherwise discipline an individual for

good cause.

STATEMENT OF THE CASE

Edward Sack ("Sack") was hired by Kimberly-Clark Corporation ("Kimberly-Clark") as an employee benefits attorney on July 23, 1979, when he was 47 years old. One year later, on July 8, 1980, Sack was fired, allegedly for unsatisfactory job performance. After the Equal Employment Opportunity Commission issued a right-to-sue notice, Sack filed suit against Kimberly-Clark alleging violation of the Age Discrimination in Employment Act, ("ADEA"), 29 U.S.C. §§ 621 et seq. The district court had jurisdiction pursuant to 29 U.S.C. § 1331.

Following discovery, Kimberly-Clark moved for summary judgment. Both parties filed briefs and supporting documents. The district court granted the motion, reasoning that Sack failed to establish a prima facie case of age discrimination because he failed

to show he was qualified for the position. Apparently the basis for that conclusion was the deposition testimony of Barry Block, who was Sack's supervisor at Kimberly-Clark, and Douglas Tormey, another employee benefits attorney there who supervised Sack. Both Block and Tormey stated during depositions that they found Sack's performance unsatisfactory. The district court decided that the testimony that the employer was dissatisfied with Sack's work meant that Sack failed to establish a prima facie case because he was "not qualified in the company's eyes." Sack v. Kimberly-Clark Corp., No. 81-C-728, at 5 (E. D. Wis. Nov. 23, 1978) (App. B, at 5).

The court of appeals agreed with the district court's reasoning and affirmed the lower court's decision. Again, the court referred to "several instances when the plaintiff's superiors thought that he was doing poor work." Sack v. Kimberly-Clark Corp.,

No. 82-3088, at 2 (7th Cir. July 28, 1983) (per curiam) (App. A, at 2).

REASONS FOR GRANTING THE WRIT

I. IF ALLOWED TO STAND UNCORRECTED, THE SEVENTH CIRCUIT'S MISINTERPRETATION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT WILL PRECLUDE ANYONE FROM ESTABLISHING A PRIMA FACIE CASE WHEN THE EMPLOYER CLAIMS DISSATISFACTION WITH THE EMPLOYEE'S JOB PERFORMANCE.

In employment discrimation cases brought under the Age Discrimination in Employment Act (ADEA), the established procedure is to first determine whether the plaintiff has a prima facie case. The plaintiff must show that he was in the protected class, that he was qualified for the position, that he was terminated, and that the employer sought a replacement for him. McDonnell Douglas Corp. v. Green, 411 U. S. 792, 802 (1973); Hodgson v. First Federal Savings & Loan Ass'n., 455 F.2d 818, 820 (5th Cir. 1972). After the plaintiff es-

tablishes a prima facie case, the burden shifts to the employer to articulate a non-discriminatory reason for the discharge. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981). If the employer meets that criterion, the burden shifts back to the plaintiff to show that the employer's articulated reason was a mere pretext for the discharge. Id.

In contrast to that well-established procedure, the district court in the instant case expressly stated that this case could be approached in two ways.

> Defendant here contends that Sack was terminated because he was not doing his job satisfactorily. On the one hand, under Kephart that would seem to indicate that Sack was not qualified for the job and therefore had not made out a prima facie case of discrimination. On the other hand, the fact that Sack was not, as Kimberly Clark contends, doing his job satisfactorily can also be viewed as an articulation of a non-discriminatory reason for Sack's termination. I believe in this case, given the short time

> which Sack was employed by the company, Sack has failed to make out a prima facie case of discrimination.

Sack v. Kimberly-Clark Corp., No. 81-C-728, at 4 (E.D. Wis. Nov. 23, 1982) (App. B, at 4). Despite its recognition of the proper procedure, the district court reversed the procedure by first looking at the employer's asserted dissatisfaction with Sack. As authority for doing so, the distrct court relied upon the analysis in Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980), wherein the Seventh Circuit Court of Appeals held that because the employer expressed dissatisfaction with the employee's job performance, the employee was not qualified, and thus failed to establish a prima facie case.

In Kephart, the Seventh Circuit approved the district court's opinion that the plaintiff failed to establish a prima facie case because he was not "qualified" in the

sense of the McDonnell Douglas formula, "i.e., his work was not satisfactory to his employers for reasons articulated by them, related to his capabilities, and unrelated to his age." Kephart, 630 F.2d at 1220 (Emphasis added). Kephart had received a warning that his job performance was unsatisfactory and he would be allowed six months to improve. Id. at 1221. He was demoted, relieved of all management responsibilities, and was not given any new projects. Id. The court decided the employer was the best judge of whether an employee was qualified in terms of the McDonnell Douglas criteria. Id. at 1219. Because Kephart's employer had expressed dissatisfaction with Kephart's work, the court concluded Kephart was not qualified. Id.

In the instant case, both the district court and the affirming Seventh Circuit followed the same analysis as was used in

Kephart, but with a less substantial factual foundation. Kimberly-Clark's subjective, nonspecific statements of dissatisfaction with Sack's work performance were accepted as a sufficient basis for defeating the establishment of a prima facie case. For example, the district court accepted as valid the supervisors' subjective complaints that they did not like Sack's writing style and that they found his work sloppy. These complaints arose after Sack was terminated. No physical or documentary evidence was presented to show sloppy work, poor writing, or any expression of serious dissatisfaction on the part of the employer. Thus, the court relied entirely upon the subjective statements of people whose credibility and motives had not been evaluated by any factfinder.

Certainly an employer should be allowed to set its own standards for whether an employee is initially qualified and remains

qualified for the position in question. Employer dissatisfaction is implicit in any employment termination, in the sense that, absent some other factor, no employer is likely to discharge someone if it is satisfied with that person's performance. But the employer cannot be allowed to make arbitrary or discriminatory decisions about qualifications. Congress enacted the ADEA for the express purpose of preventing such arbitrariness. See 29. U.S.C. § 621(b).

Nowhere in the earlier case law is there any provision for finding no prima facie case because of an employer's asserted reasons for the discharge. The employee must first establish a prima facie case, as detailed in McDonnell Douglas. Sack did so by presenting work samples, testifying about the lack of any specific criticism of his work, presenting evidence that his work was rated "competent" in a routine performance evalua-

tion, and testifying about supervisors' references to his age. In summary, he showed that "his performance was of sufficient quality to merit continued employment, thereby raising an inference that some other factor was involved in the decision to discharge him." Flowers v. Crouch-Walker Corp., 552 F. 2d 1277, 1283 (7th Cir. 1977).

This evidence was certainly sufficient to raise a prima facie case and shift the burden to the employer. Kimberly-Clark could then have claimed, as its nondiscriminatory reason for the discharge, that it discharged Sack for sloppy or otherwise inadequate work. Sack should then have been given the opportunity to establish that those reasons were pretextual. The Seventh Circuit, however, evaluated all of those stages at once, using Kimberly-Clark's claims to defeat both Sack's prima facie case and his rebuttal. The burden never shifts to the employer who

knows of Kephart and alleges dissatisfaction early in the case, because the employee's prima facie case standard cannot be met under those circumstances. In direct contravention of the well-established procedures of McDonnell Douglas and its progeny, the plaintiff in an ADEA case must rebut the employer's defense at the outset in order to establish a prima facie case.

"There is, of course, a difference between that state of facts which, if unrebutted, requires the court to direct a verdict [or grant a motion for summary judgment] and that which merely passes the threshhold test of sufficiency, leaving to the jury the ultimate decision based upon its determination of the weight and credibility of the evidence." Laugeson v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975). The Seventh Circuit's approach allows no opportunity for a court or a jury to evaluate the credibility

of witnesses whose testimony conflicts with other evidence. An employer can simply claim dissatisfaction with an employee, and thereby defeat the employee's prima facie case.

In effect, therefore, the Seventh Circuit has set a new standard for evaluating age discrimination cases: the employee must still establish that he or she was qualified for the position, but no employee is qualified if the employer says that, in its own eyes, it was dissatisfied with that employee's job performance. All an employer need do is allege that, for whatever subjective ex post facto reasons, it was not satisfied with the employee. If the employer does that, the employee is automatically precluded from establishing a prima facie case. The result of that analysis, if left unreversed, will be the elimination of all but the most blatant cases -- the "smoking gun" cases -- of age discrimination.

II. THE SEVENTH CIRCUIT IMPROPERLY CONSIDERED THE EMPLOYER'S SUBJECTIVE, SELF-SERVING STATEMENTS OF ITS MOTIVES AS A BASIS FOR FINDING THAT SACK HAD NOT ESTABLISHED A PRIMA FACIE CASE.

In both the Kephart case and the Sack case, the Seventh Circuit accepted at face value the employer's claims of dissatisfaction with the employee's job performance, and allowed those subjective, unsubstantiated claims to defeat the employee's prima facie case.

An employer's mere articulation of poor job performance as justification for discharge, particularly where motives or bias are in issue, cannot be allowed to obviate the need for a factual determination as to the former employee's qualifications. Allowing an employer to evade the sanctions of Title VII and the ADEA by claiming that, in its eyes, the employee was not qualified defeats the whole purpose of the legislation. Someone

with an initial bias regarding the qualifications of blacks, women, or anyone over the age of forty will automatically find an employee with any of those characteristics unqualified. Regardless of the quality of the employee's qualifications or on-the-job performance, the biased employer or supervisor will consistently find fault with the employee and will be able to say, in all honesty, that he or she finds that employee unqualified. It is precisely this kind of inherent discriminatory proclivity the Title VII and ADEA legislation sought to eradicate. Yet, according to Kephart, the Seventh Circuit would allow an employer to escape liability and sanction for such inherent bias by merely articulating that, in the eyes of the biased supervisor, the employee was unqualified.

An employer may be completely unaware of any inherent bias against older workers;

however, such unconscious bias is not sufficient to shield an employer from liability. "[T]he ADEA is designed to eradicate both conscious and unconscious stereotypes about the abilities of older workers. The proscriptions of the Act are not limited to employers who know that age is the reason why they are treating older workers unfavorably." Smith & Legette, Recent Issues in Litigation Under the Age Discrimination in Employment Act, 41 Ohio St. L.J. 349, 369 (1980), quoted in Kelly v. American Standard, Inc., 640 F. 2d 974, 980 N. 9 (9th Cir. 1981).

The resolution of the question of an employee's qualifications to perform the duties of the job is properly left to the factfinder. By hearing and evaluating evidence concening an employee's qualifications, the job's requirements, and the employee's performance, the factfinder can determine whether the asserted lack of qualification

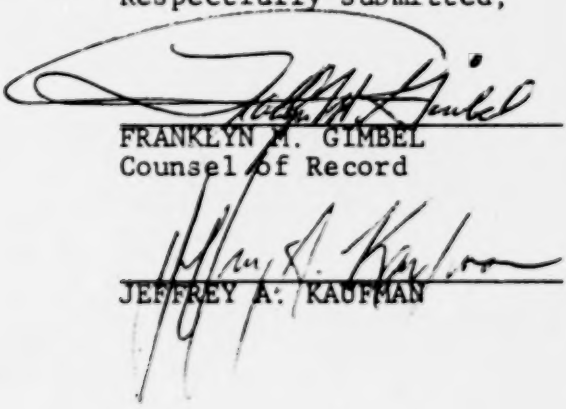
was a nondiscriminatory business justification for the discharge, and whether the asserted lack of qualifications was merely a pretext. Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 112 (9th Cir. 1981). It defeats the entire purpose of the ADEA to accept, on paper, the employer's assertions about the motivation behind the discharge, and to allow such self-serving claims, without undergoing scrutiny by a factfinder, to defeat a prima facie case.

CONCLUSION

The Seventh Circuit Court of Appeals has unreasonably extended this Court's criteria, as set forth in McDonnell Douglas, the plaintiff to establish a prima facie case in an ADEA action. In addition to showing that he or she was qualified for the position, an employee must, at the prima facie stage, rebut any assertion by the employer to the

effect that it was dissatisfied with the employee's job performance. No factfinder has the opportunity to evaluate the credibility of or basis for the employer's assertions if the employee cannot meet the employer's subjective claims at the outset. This Court is therefore respectfully urged to grant the petition for certiorari in order to fully evaluate the Seventh Circuit's approach and reinstate this Court's well-established procedures for ADEA cases.

Respectfully submitted,



FRANKLYN M. GIMBEL
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APPENDIX

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604
(ARGUED JUNE 9, 1983)

July 28, 1983

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. THOMAS E. FAIRCHILD, Senior Judge

EDWARD SACK,
Plaintiff-Appellant,

No. 82-3088

vs.

KIMBERLY-CLARK CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Wisconsin.
No. 81-728
Terence T. Evans, Judge.

ORDER

The plaintiff sued the defendant on June 22, 1981, alleging that the defendant fired him in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1967). In addition, the plaintiff asserted state law claims, alleging that the defendant made false representations during his hiring process. The district court granted summary judgment for the defendant on the age discrimination claim, and dismissed the state claims. Because there are no genuine issues of material fact requiring a trial, and because the plaintiff failed to establish a prima facie case of age discrimination, we affirm.

I

The plaintiff was hired at age forty-seven as an employee benefits attorney for the defendant. He was fired one year later. Deposition testimony reveals that the plaintiff's supervisors from time to time thought the plaintiff's work and work habits were inadequate and that the plaintiff was fired expressly because his work performance was unsatisfactory. (Block dep. 148, 172-73, 176-82, 243, 245-46, 251-53, 329; Tormey dep. 88-89, 123-28; Sack dep. 173-76, 232-34.)

APP. A

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The district court concluded under two analyses that summary judgment was appropriate. First, the court determined that when all of the plaintiff's allegations of facts were accepted as true the evidence showed that the plaintiff "was not qualified in the company's eye for the job for which he was hired. Therefore, [the plaintiff] failed to make out a prima facie case of age discrimination." (R. 30(5).) In addition, the district court reasoned that "the company . . . articulated a non-discriminatory reason for his termination," that is, unsatisfactory work performance. (R. 30(5).) The district court noted that the plaintiff had "failed entirely" to show that the defendant's reasons for the dismissal were pretextual. (R. 30(6).)

II

We believe that the district court properly analyzed the record before it. There were no genuine issues of material fact. Moreover, the plaintiff did not establish a prima facie case of discrimination. For example, the plaintiff argues that he proved his qualifications for the job principally by showing that his work was accepted by the defendant without criticism. (Appellant's br. at 12.) Yet, unrebutted deposition testimony reveals several instances when the plaintiff's superiors thought that he was doing poor work. In addition, the only evidence offered to show that the defendant's professed reason for the firing was pretextual--that there was a pattern in the office of age discrimination--in fact showed no pattern of discrimination at all. (R. 29(6-10); R. 30(6).) The district court, relying in part on this circuit's decision in Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981), concluded that the plaintiff did not show that age was a determining factor in his discharge. We agree.

Only three points in this appeal merit our attention. First, the plaintiff argues that a "competent" rating he received from his superiors six months before he was fired establishes a prima facie case of discrimination, citing Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975). But Laugesen dealt only with whether a dispute of fact at trial shifted the burden to the defendant to prove non-discrimination. The document in Laugesen which the plaintiff claims is analogous to his "competent" rating was a separation notice form which, among other things, rated the plaintiff "good." Here, even accepting the plaintiff's interpretation of the "competent" rating--an interpretation sharply disputed by the defendant--does not raise a triable issue, for, in the period between the "competent" rating and his termination, the plaintiff was not performing adequately, according to unrebutted deposition testimony.

(A) 2

Second, the plaintiff argues that the United States Supreme Court's decision in United Postal Service Board of Governors v. Aikens, 103 S. Ct. 1478 (1983), requires us to reverse because it has changed the requirements for establishing a prima facie case of discrimination. We do not believe that Aikens requires reversal here. Aikens does not change the McDonnell Douglas-Burdine standards for establishing a prima facie case of discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Rather, the Court in Aikens clarifies the requirements of proof at trial after a defendant has failed to persuade the district court to dismiss the action for lack of a prima facie case. See Aikens, 103 S. Ct. at 1482; id. at 1483 (Blackmun, J., concurring).

Third, the plaintiff argues that the district court abused its discretion in dismissing the pendent state claims which the plaintiff pressed against the defendant, because one or more of the claims will be time barred from state adjudication. We do not believe that the district court abused its discretion. See Wis. Stat. Ann. § 893.15(3) (1980); see also Shafer v. Wegner, 78 Wis.2d 127, 135, 254 N.W.2d 193, 197 (1977).

III

The district court's judgment granting the defendant's motion for summary judgment and dismissing the complaint is affirmed.

AFFIRMED.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

EDWARD SACK,

Plaintiff,

v.

KIMBERLY-CLARK CORPORATION,

Defendant.

Civil Action
No. 81-C-728

DECISION and ORDER

This action, brought under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, et seq., is before me on the defendant's motion for summary judgment.

The plaintiff Edward Sack was hired as an "Employee Benefits Attorney" by the defendant Kimberly-Clark Corporation on July 23, 1979. At that time Sack was 47 years old. Sack was hired by Barry S. Block, the Director of Kimberly-Clark's Employee Benefits Administration Department. On July 8, 1980, less than a year after he was hired, Sack was terminated by Block. This action arises out of the termination.

Before he came to Kimberly-Clark, Sack worked as an attorney at the Paul Revere Life Insurance Company. He resigned that position effective November 30, 1978. He actively pursued employment after his resignation but did not accept another job until he went to Kimberly-Clark in July of 1979.

Sack was told during the interviewing process with Kimberly-Clark that the company was looking for an experienced Employee Benefits Attorney to allow the company to reduce its use of outside counsel. The attorney then working for Kimberly-Clark, Mr. Douglas Tormey, who continued to work with Sack, apparently did not have sufficient expertise in the field to allow the company to reduce its use of outside counsel.

APP. B

Soon after starting work for Kimberly-Clark, Sack felt that he was not being used to his full potential. He did not replace outside counsel and he felt there were projects which he could have been helping with but which he was not allowed to work on. Within six months from the time he began employment with the company he felt that his job was in jeopardy. In the spring of 1980, at the direction of Block, Sack ceased reporting directly to Block and began reporting to Tormey. Then on July 8, 1980, Block informed Sack that he was being terminated.

Following the termination Sack filed a charge of age discrimination with the Equal Employment Opportunity Commission (EEOC). He furnished a detailed memorandum to the agency describing what he considered to be the facts supporting his claim of age discrimination. He was issued a notice of right-to-sue and he filed this federal court action on June 22, 1981.

Defendant argues that summary judgment should be granted because plaintiff has failed to make out a prima facie case of age discrimination. Alternatively defendant argues that even if plaintiff has made out a prima facie case of discrimination, there is no showing that Kimberly-Clark's stated justification for the dismissal was pretextual. Finally, defendant argues that if summary judgment is entered on the age discrimination claim, Sack's pendent state claims should be dismissed.

Summary judgment in discrimination cases, which often involve issues of intent, must be approached with caution. However, some cases are appropriate for summary disposition. In Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1218 (7th Cir. 1980), the court stated:

> "Summary judgment is improper in a discrimination case -- or any other -- if it involves -- as it often must -- any weighing of conflicting indications of motive and intent. Here plaintiff had no indications of motive and intent, supportive of his position, to put on the scales for weighing. It was a wholly empty case. In such circumstances, summary judgment is proper."

Like Kephart, this case is appropriate for summary disposition.

In order to meet his burden in establishing an age discrimination claim, Sack must show that age was a determining factor in his discharge. Kephart, supra.

The analysis of an age discrimination claim follows generally the pattern used in Title 7 cases as set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The plaintiff has the initial burden of establishing a prima facie case of discrimination. He must show that he belongs to the protected class, that he was qualified for the position, that, as in the situation before me, he was terminated, and that the employer attempted to replace him. Kephart emphasizes that the requirement that a plaintiff be qualified for the position is a changing requirement. That is, a plaintiff could be qualified under one set of circumstances but if the circumstances change in any way he may no longer be considered qualified. Kephart also emphasizes that within limits, it is the employer who determines whether an individual is qualified.

Once a plaintiff has made out a prima facie case, a defendant must articulate a non-discriminatory reason for the termination. A defendant, however, never has the ultimate burden of proof which, at all times, remains with the plaintiff. Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981). After an employer articulates a justification for an adverse employee action, the employee must prove that the justification was merely a pretext -- that "but for" his age, he would not have been terminated.

Under this analysis, this case could be approached in two ways. Defendant here contends that Sack was terminated because he was not doing his job satisfactorily. On the one hand, under Kephart that would seem to indicate that Sack was not qualified for the job and therefore had not made out a prima facie case of discrimination. On the other hand, the fact that Sack was not, as Kimberly-Clark contends, doing his job satisfactorily can also be viewed as an articulation of a non-discriminatory reason for Sack's termination. I believe in this case, given the short time which Sack was employed by the company, Sack has failed to make out a prima facie case of discrimination.

The plaintiff in Kephart failed to make a prima facie case even though he possessed on paper what would seem to be the qualifications necessary for the job and even though the company must have once thought him qualified because it hired him:

> "Presumably Mr. Kephart's degrees in economics do not ipso facto qualify him, nor does the fact that IGT once hired him." Kephart, at 1219.

Kephart was not qualified because:

> "... his work was not satisfactory to his employers for reasons articulated by them, related to his capabilities, and unrelated to his age."

Similarly, Sack's possession of a law degree and the fact that Kimberly-Clark hired him do not insure that he is qualified. In fact, he is not qualified for the job because his supervisors were disappointed in his capabilities and in the quality of his work.

Barry S. Block stated that he was unsatisfied with Sack's work. He stated that Sack spent much of his time staring out the window, reading the Wall Street Journal, or socializing with other employees. Block Dep., February 24, 25 and March 25, 1982, p. 245. Block also stated that Sack required too much

supervision; that there were many errors in his work; and that he had a poor writing style. Block Dep., pp. 252-253. By January, 1980, Block had very little faith in Sack's work and felt that he had to recheck everything that Sack did. Block Dep., p. 148. Consequently, Block changed the supervision structure of the department so that Sack reported to Tormey rather than to Block, to give Sack "every chance of doing a satisfactory job." Block Dep., p. 172.

Tormey, however, was also not happy with Sack's work. He also felt that he had to recheck everything. He stated that Sack was not thorough in the research he did. Tormey Dep., April 7, 1982, pp. 88, 89. Tormey agreed with Block that Sack should be terminated.

Sack himself acknowledges that Block told him that he did not like his writing style and that his work was sloppy and careless. Block Dep., February 23 and 24, 1982, pp. 174, 175. Sack states that he never received praise or statements of approval from anyone at Kimberly-Clark. Sack Dep., p. 232.

On the basis of this record, I find that Sack was not qualified in the company's eyes for the job for which he was hired. Therefore, he has failed to make out a prima facie case of age discrimination.

Even were the case viewed from the other angle, that is if I were to say that Sack was qualified for the job and that he had therefore established a prima facie case, the company has, in my judgment, articulated a non-discriminatory reason for his termination. As the court stated in Kephart, at 1219:

> "Of course, unsatisfactory performance is the best of reasons [for termination], and the district judge construed this to mean unsatisfactory as evaluated by the employer, a decision, if not a mere pretext, not to be second-guessed by the court."

The dissatisfactions set forth above can also be seen as a non-discriminatory business reason for the termination.

Sack has failed entirely to show that the reasons are pretextual. He argues that the evidence shows a pattern of behavior in the treatment of older employees in Block's department of the company. The undisputed facts do not support the contention. Barbara Jones, Payroll Manager, age 45, resigned voluntarily and was replaced by Eugene Bahlman, age 52. Ken Boulay, age 47, was transferred to another position and was replaced by another employee of the company, Mark Vander Zanden, age 39. Vander Zanden got the position because Block's supervisor wanted Vander Zanden's previous position for someone else. Donald Marshall, age 49, was transferred back to a position he had previously held for which he had more suitable skills. Howard Wainscott, age 66, retired. I cannot find that these employee transfers show any pattern, let alone an unlawful one.

Sack does not seriously contend that any statements made by company officials show that they discriminated against people on the basis of age. Block mentioned age only twice in conversations with Sack. Sack acknowledges that the import of these conversations is "less direct." Brief filed July 27, 1982, p. 17. One of the conversations was to the effect that Sack's pension would vest before he had put in ten years of service. This reference is too vague to show anything at all, especially since no context for the statement is given. The second conversation was to the effect that Sack was a 45-year-old kid. Sack argues that this shows that Block disapproved of him because of his age. A much more rational explanation is that Block's disapproval of Sack was related to his behavior rather than his age -- that is, he was not acting mature.

The evidence in the record points to one of two conclusions. Either the company was genuinely unhappy with the quality of Sack's work or Sack's supervisor, Barry Block, was unable to work with Sack because of some sort of personality

conflict. Sack acknowledges that the latter may have been the case: "I may have been hostile to him and I think he was hostile to me." Sack Dep., February 23, 24, 1982, p. 232. However, nothing in the record indicates that age was a determining factor in Sack's termination.

Therefore, the defendant's motion for summary judgment on that issue is granted. Because the federal claim has been dismissed, Counts 2 and 3 of Sack's complaint which set forth pendent state claims are also dismissed. United Mineworkers v. Gibb, 383 U.S. 715 (1966).

IT IS THEREFORE ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed.

Dated at Milwaukee, Wisconsin, this 23 day of November, 1982.

BY THE COURT:

Terence Evans

TERENCE T. EVANS
UNITED STATES DISTRICT JUDGE

83-834

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

Case No. _____

IN THE

Supreme Court of the United States

October Term, 1983

EDWARD SACK

Petitioner.

v.

KIMBERLY-CLARK CORPORATION

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
(ARGUED JUNE 9, 1983)

July 28, 1983

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. THOMAS E. FAIRCHILD, Senior Judge

EDWARD SACK,)
Plaintiff-Appellant,)
No. 82-3088 vs.)
KIMBERLY-CLARK CORPORATION,)
Defendant-Appellee.)

Appeal from the United
States District Court
for the Northern [sic]
District of Wisconsin.
No. 81-728
Terence T. Evans, Judge.

ORDER

The plaintiff sued the defendant on June 22, 1981, alleging that the defendant fired him in violation of the Age Discrimin-

ation in Employment Act, 29 U.S.C. §§ 621-634 (1967). In addition, the plaintiff asserted state law claims, alleging that the defendant made false representations during his hiring process. The district court granted summary judgment for the defendant on the age discrimination claim, and dismissed the state claims. Because there are no genuine issues of material fact requiring a trial, and because the plaintiff failed to establish a prima facie case of age discrimination, we affirm.

I

The plaintiff was hired at age forty-seven as an employee benefits attorney for the defendant. He was fired one year later. Deposition testimony reveals that the plaintiff's supervisors from time to time thought the plaintiff's work and work habits were inadequate and that the plaintiff was fired expressly because his work performance was

unsatisfactory. (Block dep. 148, 172-73, 176-82, 243, 245-56, 251-53, 329; Tormey dep. 88-89, 123-28; Sack dep. 173-76, 232-34.)

The district court concluded under two analyses that summary judgment was appropriate. First, the court determined that when all of the plaintiff's allegations of facts were accepted as true the evidence showed that the plaintiff "was not qualified in the company's eye for the job for which he was hired. Therefore, [the plaintiff] failed to make out a prima facie case of age discrimination." (R. 30(5).) In addition, the district court reasoned that "the company . . . articulated a non-discriminatory reason for his termination," that is, unsatisfactory work performance. (R. 30(5).) The district court noted that the plaintiff had "failed entirely" to show that the defendant's reasons for the dismissal were pretextual. (R. 30(6).)

II

We believe that the district court properly analyzed the record before it. There were no genuine issues of material fact. Moreover, the plaintiff did not establish a prima facie case of discrimination. For example, the plaintiff argues that he proved his qualifications for the job principally by showing that his work was accepted by the defendant without criticism. (Appellant's br. at 12.) Yet, unrebutted deposition testimony reveals several instances when the plaintiff's superiors thought that he was doing poor work. In addition, the only evidence offered to show that the defendant's professed reason for the firing was pretextual--that there was a pattern in the office of age discrimination--in fact showed no pattern of discrimination at all. (R. 29(6-10); R. 30(6).) The district court, relying in part on this circuit's

decision in Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981), concluded that the plaintiff did not show that age was a determining factor in his discharge. We agree.

Only three points in this appeal merit our attention. First, the plaintiff argues that a "competent" rating he received from his superiors six months before he was fired establishes a prima facie case of discrimination, citing Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975). But Laugesen dealt only with whether a dispute of fact at trial shifted the burden to the defendant to prove non-discrimination. The document in Laugesen which the plaintiff claims is analogous to his "competent" rating was a separation notice form which, among other things, rated the plaintiff "good." Here, even accepting the plaintiff's interpreta-

tion of the "competent" rating--an interpretation sharply disputed by the defendant--does not raise a triable issue, for, in the period between the "competent" rating and his termination, the plaintiff was not performing adequately, according to unrebutted deposition testimony.

Second, the plaintiff argues that the United States Supreme Court's decision in United Postal Service Board of Governors v. Aikens, 103 S. Ct. 1478 (1983), requires us to reverse because it has changed the requirements for establishing a prima facie case of discrimination. We do not believe that Aikens requires reversal here. Aikens does not change the McDonnell Douglas-Burdine standards for establishing a prima facie case of discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Rather, the

Court in Aikens clarifies the requirements of proof at trial after a defendant has failed to persuade the district court to dismiss the action for lack of a prima facie case. See Aikens, 103 S. Ct. at 1482; id. at 1483 (Blackmun, J., concurring).

Third, the plaintiff argues that the district court abused its discretion in dismissing the pendent state claims which the plaintiff pressed against the defendant, because one or more of the claims will be time barred from state adjudication. We do not believe that the district court abused its discretion. See Wis. Stat. Ann. § 893.15(3) (1980); see also Shafer v. Wegner, 78 Wis.2d 127, 135, 254 N.W.2d 193, 197 (1977).

III

The district court's judgment granting the defendant's motion for summary judgment and dismissing the complaint is affirmed.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

EDWARD SACK,

Plaintiff,

v.

Civil Action
No. 81-C-728

KIMBERLY-CLARK CORPORATION,

Defendant.

DECISION and ORDER

This action, brought under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, et seq., is before me on the defendant's motion for summary judgment.

The plaintiff Edward Sack was hired as an "Employee Benefits Attorney" by the defendant Kimberly-Clark Corporation on July 23, 1979. At that time Sack was 47 years old. Sack was hired by Barry S. Block, the Director of Kimberly-Clark's Employee Benefits Administration Department. On July 8, 1980, less than a year after he was hired,

Sack was terminated by Block. This action arises out of the termination.

Before he came to Kimberly-Clark, Sack worked as an attorney at the Paul Revere Life Insurance Company. He resigned that position effective November 30, 1978. He actively pursued employment after his resignation but did not accept another job until he went to Kimberly-Clark in July of 1979.

Sack was told during the interviewing process with Kimberly-Clark that the company was looking for an experienced Employee Benefits Attorney to allow the company to reduce its use of outside counsel. The attorney then working for Kimberly-Clark, Mr. Douglas Tormey, who continued to work with Sack, apparently did not have sufficient expertise in the field to allow the company to reduce its use of outside counsel.

Soon after starting work for Kimberly-Clark, Sack felt that he was not being used

to his full potential. He did not replace outside counsel and he felt there were projects which he could have been helping with but which he was not allowed to work on. Within six months from the time he began employment with the company he felt that his job was in jeopardy. In the spring of 1980, at the direction of Block, Sack ceased reporting directly to Block and began reporting to Tormey. Then on July 8, 1980, Block informed Sack that he was being terminated.

Following the termination Sack filed a charge of age discrimination with the Equal Employment Opportunity Commission (EEOC). He furnished a detailed memorandum to the agency describing what he considered to be the facts supporting his claim of age discrimination. He was issued a notice of right-to-sue and he filed this federal court action on June 22, 1981.

Defendant argues that summary judgment should be granted because plaintiff has failed to make out a prima facie case of age discrimination. Alternatively defendant argues that even if plaintiff has made out a prima facie case of discrimination, there is no showing that Kimberly-Clark's stated justification for the dismissal was pretextual. Finally, defendant argues that if summary judgment is entered on the age discrimination claim, Sack's pendent state claims should be dismissed.

Summary judgment in discrimination cases, which often involve issues of intent, must be approached with caution. However, some cases are appropriate for summary disposition. In Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1218 (7th Cir. 1980), the court stated:

> "Summary judgment is improper in a discrimination case -- or any other -- if it

> involves -- as it often must -- any weighing of conflicting indications of motive and intent. Here plaintiff had no indications of motive and intent, supportive of his position, to put on the scales for weighing. It was a wholly empty case. In such circumstances, summary judgment is proper."

Like Kephart, this case is appropriate for summary disposition.

In order to meet his burden in establishing an age discrimination claim, Sack must show that age was a determining factor in his discharge. Kephart, supra.

The analysis of an age discrimination claim follows generally the pattern used in Title 7 cases as set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The plaintiff has the initial burden of establishing a prima facie case of discrimination. He must show that he belongs to the protected class, that he was qualified for the position, that, as in the situation

before me, he was terminated, and that the employer attempted to replace him. Kephart emphasizes that the requirement that a plaintiff be qualified for the position is a changing requirement. That is, a plaintiff could be qualified under one set of circumstances but if the circumstances change in any way he may no longer be considered qualified. Kephart also emphasizes that within limits, it is the employer who determines whether an individual is qualified.

Once a plaintiff has made out a prima facie case, a defendant must articulate a non-discriminatory reason for the termination. A defendant, however, never has the ultimate burden of proof which, at all times, remains with the plaintiff. Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981). After an employer articulates a justification for an adverse employee action, the employee must prove that the justification

was merely a pretext -- that "but for" his age, he would not have been terminated.

Under this analysis, this case could be approached in two ways. Defendant here contends that Sack was terminated because he was not doing his job satisfactorily. On the one hand, under Kephart that would seem to indicate that Sack was not qualified for the job and therefore had not made out a prima facie case of discrimination. On the other hand, the fact that Sack was not, as Kimberly-Clark contends, doing his job satisfactorily can also be viewed as an articulation of a non-discriminatory reason for Sack's termination. I believe in this case, given the short time which Sack was employed by the company, Sack has failed to make out a prima facie case of discrimination.

The plaintiff in Kephart failed to make a prima facie case even though he possessed

on paper what would seem to be the qualifications necessary for the job and even though the company must have once thought him qualified because it hired him:

> "Presumably Mr. Kephart's degrees in economics do not ipso facto qualify him, nor does the fact that IGT once hired him." Kephart, at 1219.

Kephart was not qualified because:

> "... his work was not satisfactory to his employers for reasons articulated by them, related to his capabilities, and unrelated to his age."

Similarly, Sack's possession of a law degree and the fact that Kimberly-Clark hired him do not insure that he is qualified. In fact, he is not qualified for the job because his supervisors were disappointed in his capabilities and in the quality of his work.

Barry S. Block stated that he was unsatisfied with Sack's work. He stated

that Sack spent much of his time staring out the window, reading the Wall Street Journal, or socializing with other employees. Block Dep., February 24, 25 and March 25, 1982, p. 245. Block also stated that Sack required too much supervision; that there were many errors in his work; and that he had a poor writing style. Block Dep., pp. 252-253. By January, 1980, Block had very little faith in Sack's work and felt that he had to recheck everything that Sack did. Block Dep. p. 148. Consequently, Block changed the supervision structure of the department so that Sack reported to Tormey rather than to Block, to give Sack "every chance of doing a satisfactory job." Block Dep., p. 172.

Tormey, however, was also not happy with Sack's work. He also felt that he had to recheck everything. He stated that Sack was not thorough in the research he did. Tormey Dep., April 7, 1982, pp. 88, 89.

Tormey agreed with Block that Sack should be terminated.

Sack himself acknowledges that Block told him that he did not like his writing style and that his work was sloppy and careless. Block Dep., February 23 and 24, 1982, pp. 174, 175. Sack states that he never received praise or statements of approval from anyone at Kimberly-Clark. Sack Dep., p. 232.

On the basis of this record, I find that Sack was not qualified in the company's eyes for the job for which he was hired. Therefore, he has failed to make out a prima facie case of age discrimination.

Even were the case viewed from the other angle, that is if I were to say that Sack was qualified for the job and that he had therefore established a prima facie case, the company has, in my judgment, articulated a non-discriminatory reason for his termina-

tion. As the court stated in Kephart, at 1219:

> "Of course, unsatisfactory performance is the best of reasons [for termination], and the district judge construed this to mean unsatisfactory as evaluated by the employer, a decision, if not a mere pretext, not to be second-guessed by the court."

The dissatisfactions set forth above can also be seen as a non-discriminatory business reason for the termination.

Sack has failed entirely to show that the reasons are pretextual. He argues that the evidence shows a pattern of behavior in the treatment of older employees in Block's department of the company. The undisputed facts do not support the contention. Barbara Jones, Payroll Manager, age 45, resigned voluntarily and was replaced by Eugene Bahlman, age 52. Ken Boulay, age 47, was transferred to another position and was replaced by another employee of the company,

Mark Vander Zanden, age 39. Vander Zanden got the position because Block's supervisor wanted Vander Zanden's previous position for someone else. Donald Marshall, age 49, was transferred back to a position he had previously held for which he had more suitable skills. Howard Wainscott, age 66, retired. I cannot find that these employee transfers show any pattern, let alone an unlawful one.

Sack does not seriously contend that any statements made by company officials show that they discriminated against people on the basis of age. Block mentioned age only twice in conversations with Sack. Sack acknowledges that the import of these conversations is "less direct." Brief filed July 27, 1982, p. 17. One of the conversations was to the effect that Sack's pension would vest before he had put in ten years of service. This reference is too vague to show anything at all, especially since no

context for the statement is given. The second conversation was to the effect that Sack was a 45-year-old kid. Sack argues that this shows that Block disapproved of him because of his age. A much more rational explanation is that Block's disapproval of Sack was related to his behavior rather than his age -- that is, he was not acting mature.

The evidence in the record points to one of two conclusions. Either the company was genuinely unhappy with the quality of Sack's work or Sack's supervisor, Barry Block, was unable to work with Sack because of some sort of personality conflict. Sack acknowledges that the latter may have been the case: "I may have been hostile to him and I think he was hostile to me." Sack Dep., February 23, 24, 1982, p. 232. However, nothing in the record indicates that age was a determining factor in Sack's termination.

Therefore, the defendant's motion for

summary judgment on that issue is granted. Because the federal claim has been dismissed, Counts 2 and 3 of Sack's complaint which set forth pendent state claims are also dismissed. United Mineworkers v. Gibb, 383 U.S. 715 (1966).

IT IS THEREFORE ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed.

Dated at Milwaukee, Wisconsin, this 23 day of November, 1982.

BY THE COURT:

/s/ Terence Evans
TERENCE T. EVANS
UNITED STATES DISTRICT JUDGE

Office - Supreme Court, U.S.
FILED
DEC 13 1983
ALEXANDER L. STEVAS,
CLERK

Case No. 83-834

IN THE

Supreme Court of the United States

October Term, 1983

EDWARD SACK,

Petitioner,

v.

KIMBERLY-CLARK CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the decision of the Court of Appeals for the Seventh Circuit conflict with decisions of this Court or other federal appellate courts with respect to its holding that, as one element in a claim of age discrimination, a plaintiff must establish that he was "qualified" for the position from which he was discharged by showing that he was performing at a level that met his employer's legitimate expectations?

2. Did the Court of Appeals for the Seventh Circuit properly conclude that there existed no genuine issue of material fact regarding Kimberly-Clark Corporation's motivation for discharging Edward Sack?

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RULE 28.1 LISTING

Pursuant to Supreme Court Rule 28.1, respondent submits the following list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of respondent. In accordance with the instructions of the Clerk, only publicly-traded corporations are listed. The corporations listed below may not be "affiliates" or "publicly held," as those terms are used by the Securities and Exchange Commission:

Kimberly-Clark de Mexico, S.A. de C.V.

Carlton Paper Corporation Ltd.

STATEMENT OF THE CASE

Petitioner, Edward Sack, commenced this action against Respondent, Kimberly-Clark Corporation, on June 22, 1981, alleging that his termination from his position as an employee benefits attorney, less than one year after his hiring, was because of his age (then 48) in violation of the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 29 U.S.C. §621 et seq. Following the completion of discovery, Kimberly-Clark moved for summary judgment, which motion was granted on November 23, 1982. Sack v. Kimberly-Clark Corporation, No. 81-C-728 (E.D. Wis., Nov. 23, 1983) (App. B). On appeal, the Court of Appeals for the

Seventh Circuit affirmed. Sack v. Kimberly-Clark Corporation, No. 82-3088 (7th Cir. July 28, 1983) (per curiam) (App. A). Both the District Court and the Seventh Circuit found that Sack had failed to establish a prima facie case of age discrimination under this Court's analysis in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The District Court found that Sack had failed to establish that he was "qualified" for the position from which he was discharged in the sense that he was performing at the legitimate standards set by his employer. The District Court reviewed extensive deposition testimony from Sack's super-

visors, Mr. Barry Bloch,[1] who originally hired Sack and eventually made the decision to discharge him, and Mr. Douglas Tormey, regarding their dissatisfaction with Sack's work, noted Sack's admission that there were errors in his work and that he had received criticism regarding his work and his writing style, and found that Sack had failed to establish that he was performing at the legitimate standards set by his employer and that Sack had therefore failed to establish a prima facie case of age discrimination. Alternatively, the District Court held that, even if Sack had established a prima facie case of age discrimination,

---

[1]Both the District Court and the Court of Appeals incorrectly spelled Mr. Bloch's name "Block."

Kimberly-Clark had articulated a legitimate, non-discriminatory reason (Sack's poor work performance) for discharging Sack. The Seventh Circuit affirmed the District Court's holding in its entirety.

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT OR DECISIONS OF OTHER FEDERAL COURTS OF APPEALS, AND THE PETITION FOR WRIT OF CERTIORARI SHOULD THEREFORE BE DENIED.

Review on writ of certiorari is not a matter of right. It will be granted only when there are special and important reasons. Among the reasons considered are:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision

> of another federal court of appeals on the same matter ...
>
> * * *
>
> (b) When a ... federal court of appeals ... has decided a federal question in a way in conflict with applicable decisions of this Court.

Sup.Ct.R. 17.1. Although Edward Sack, the petitioner, has not discussed the application of these standards in his petition, it appears that he is arguing that the decision of the Seventh Circuit in Sack v. Kimberly-Clark Corp., No. 82-3088 (7th Cir. July 28, 1983) (per curiam) (App. A) conflicts with the reasoning applied by other federal appellate courts and this Court in analyzing the elements of a cause of action under the Age Discrimination in Employment Act.

Because the reasoning used by the Seventh Circuit is not inconsistent with other decisions, the petition should be denied.

Sack asserts that the Seventh Circuit's analysis will preclude any plaintiff from establishing a prima facie case of age discrimination (Petition at 7). This assertion is premised on the District Court's conclusion, affirmed by the Court of Appeals, that Sack had failed to establish a necessary element of a prima facie case of employment discrimination, the "qualified for the position" element, as explained in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). However, those courts' determinations that Sack was not "qualified" were based on Kimberly-Clark's unrebutted evidence

that Sack was not performing up to its legitimate standards. Sack takes issue with this method of analysis, noting that the Seventh Circuit followed its previous decision in Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980), in determining that he had not made out a prima facie case of age discrimination (Petition at 10-11). This argument provides no legitimate basis for the granting of Sack's petition.

First, if Sack is attacking the method of analysis employed in Kephart, that attack is inappropriate. Throughout Sack's petition, he repeatedly fails to note that this Court denied certiorari in that case. See 450 U.S. 959 (1981). Kephart is not now before this Court for review.

More importantly, Sack is wrong in contending that the Seventh Circuit departed from established methods of analysis under the ADEA in determining that he had not made out a prima facie case of age discrimination. Sack's bold assertion that "[n]owhere in the earlier case law is there any provision for finding no prima facie case because of an employer's asserted reasons for the discharge" (Petition at 12) is erroneous.

In Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979), which is one of the earlier circuit court decisions to apply the McDonnell Douglas criteria to cases under the ADEA, the First Circuit noted that, in order to make out a prima facie case of age discrimination in a discharge

case, a plaintiff must show that he was "qualified" in the sense that "he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative." 600 F.2d at 1013. The proper standard to be applied in determining whether a plaintiff establishes a prima facie case on qualification is whether "he was performing his job at a level that met his employer's legitimate expectations" 600 F.2d at 1014 (emphasis added). Thus, contrary to Sack's argument, "the employer's asserted reason for the discharge" can and should play an important role in determining whether a prima facie case of age discrimination has been established.

The Seventh Circuit, in both Kephart and Sack, employed precisely the same analysis used in Loeb. The Court in both cases determined that the plaintiffs were not performing their jobs at a level that met their employers' legitimate expectations, and appropriately concluded that the plaintiffs therefore had not established prima facie cases of age discrimination.

The method of analysis first enunciated by the First Circuit in Loeb has been repeatedly recognized and applied by other federal appellate courts as well. See, e.g., Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 290-91 (8th Cir. 1982), cert. denied, __ U.S. __, 103 S.Ct. 1194 (1983); Lovelace v.

Sherwin-Williams Co., 681 F.2d 230, 244 (4th Cir. 1982); and Locke v. Commercial Union Insurance Co., Div. of Commercial Union Assurance Companies, Ltd., 676 F.2d 205 (6th Cir. 1982). Thus, Sack is wrong in suggesting that the Seventh Circuit's method of analysis is somehow novel or represents a departure from established ADEA standards. Since the unrebutted evidence showed that Sack "was fired for inadequate job performance," Loeb, supra, 600 F.2d at 1013, Sack failed to establish that he was "qualified" so as to make out a prima facie case of age discrimination.

II. THERE EXISTS NO GENUINE ISSUE REGARDING KIMBERLY-CLARK'S MOTIVE FOR DISCHARGING EDWARD SACK.

In actuality, Sack is merely attacking the sufficiency of Kimberly-Clark's evidence that he was not living up to his superiors' expectations and that this was the reason for his discharge. This attack only highlights the total lack of any evidence rebutting his superiors' judgments and, more importantly, the absence of the necessary link or nexus between his termination and his age.

Sack asserts that no individual will be able to establish that he or she is "qualified" in a discharge case since all employers will assert (subjectively) that unsatisfactory performance prompted the discharge and employers will thereby

always be able to defeat a prima facie case of discrimination (Petition at 15-19). What this argument ignores is that unrebutted evidence, even if subjective, can and must be sufficient to support the granting of a summary judgment motion. Hahn v. Sargent, 523 F.2d 461, 468 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976). This is why Rule 56 exists. In order to avoid the operation of the Rule, the opposing party must present competent evidence that a genuine issue of material fact is present. When Kimberly-Clark (1) alleged that Sack was not performing his job satisfactorily and that this, and not his age, was the reason for his discharge, and (2) presented evidence in support of these

allegations in the form of affidavits, exhibits and deposition testimony, it was incumbent on Sack to respond so as to avoid summary judgment. Sack had to present competent evidence that he was performing satisfactorily and that his supervisors' judgments were not only wrong, but were a pretext for age discrimination. He did not do this and the Circuit Court correctly affirmed the District Court by relying upon the "unrebutted deposition testimony" and plaintiff's failure to "show that age was a determining factor in his discharge" (App. A (4) - (6)). All Sack submitted was his own unsupported and self-serving testimony that he was performing satis-

factorily and that he was discharged because of his age.[2]

While it is true that the issue of qualification is ordinarily one for the factfinder (Petition at 18-19), that is only so if there exist genuine issues of material fact to be "found." No such genuine issues existed here. Sack's argument, carried to its

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[2]Not only is Sack's self-serving testimony unsupported by any record evidence, but he has seriously mischaracterized the evidence that is of record. Sack asserts that no criticism of his work was presented while he was employed at Kimberly-Clark and that complaints arose only after he was terminated (Petition at 11, 15). However, both the Seventh Circuit and the District Court found otherwise, based on Sack's own testimony. See App. A (2)(3), B(10); "Sack himself acknowledges that Block [sic] told him that he did not like his writing style and that his work was sloppy and careless." This Court should not be misled.

logical extreme, is that every discharged employee who claims or suspects discrimination is entitled to a trial on the merits even though full discovery revealed no evidence to support the suspicion. This is absurd.

Whether one employs the method of analysis enunciated in McDonnell Douglas, or whether one simply and directly analyzes whether the plaintiff has presented sufficient evidence to establish a link between his termination and his age, see Laugesen v. Anaconda Co., 510 F.2d 307, 317 (6th Cir. 1975), Sack's evidence was insufficient. His wishful assertion that "he showed that 'his performance was of sufficient quality to merit continued employment, thereby raising an inference

that some other factor was involved in the decision to discharge him'" (Petition at 13) is precisely what he failed to show. Since the evidence of record undisputedly established that Sack was terminated for poor work performance and for no other reason, the petition for writ of certiorari should be denied.

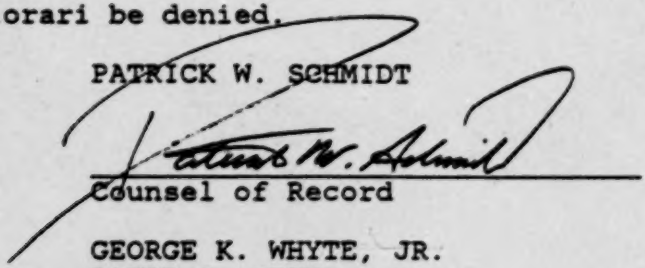
CONCLUSION

Edward Sack has failed to establish that there are "special and important reasons" to justify a granting of his petition for writ of certiorari. The decision of the Court of Appeals for the Seventh Circuit (1) is consistent with the established analysis of the requirements for a prima facie case under the

ADEA, (2) did not unreasonably extend this Court's McDonnell Douglas decision, (3) conforms with the standards applicable to Rule 56 summary judgment motions, and (4) is supported by the evidence of record. Therefore, Kimberly-Clark Corporation, respectfully

requests that the petition for writ of certiorari be denied.

PATRICK W. SCHMIDT



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